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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

<b>ADAM DEACON FOSTER,</b>	)	
	)	<b>NO. 48422-2020</b>
<b>Petitioner-Appellant,</b>	)	
	)	<b>BONNER COUNTY NO. CV09-20-784</b>
<b>v.</b>	)	
	)	
<b>STATE OF IDAHO,</b>	)	<b>APPELLANT'S BRIEF</b>
	)	
<b>Respondent.</b>	)	
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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BONNER**

---

**HONORABLE BARBARA BUCHANAN  
District Judge**

---

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## STATEMENT OF THE CASE

### Nature of the Case

Adam Deacon Foster asserts on appeal that the district court, when it summarily dismissed his petition for post-conviction relief, abused its discretion by sua sponte taking judicial notice of the entire case file from the underlying case. Because the district court did not comply with the specificity requirement of Idaho Rule of Evidence 201(c) when it took judicial notice of the entire case file, it did not act consistently with the applicable legal standards. The district court's abuse of discretion was not harmless, because the improperly noticed facts influenced the outcome of this case.

### Statement of the Facts and Course of Proceedings

In Bonner County No. CR-2017-457, the State filed a Criminal Complaint alleging Mr. Foster had committed two counts of attempted first degree murder, with infliction of great bodily injury and use of a deadly weapon sentencing enhancements. (No. 46536 R., pp.22-26.)<sup>1</sup> The Criminal Complaint alleged that Mr. Foster had shot two sheriff's deputies. (*See* No. 46536 R., p.23.) At Mr. Foster's first appearance, the magistrate court appointed counsel to represent him. (*See* No. 46536 R., p.40.)

The magistrate court ordered an Idaho Code §§ 18-210 and 18-211 evaluation for Mr. Foster, and appointed Philip A. Hanger, Ph.D., to examine and report on Mr. Foster's mental condition. (No. 46536 R., pp.57-59.) In February 2017, Dr. Hanger examined Mr. Foster and

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<sup>1</sup> Mr. Foster is challenging the propriety of the district court's decision to take judicial notice of the entire case file from the underlying case, Supreme Court Docket No. 46536. However, because the district court considered the documents from the underlying case, Mr. Foster has filed a motion alongside this brief requesting that this Court take judicial notice of the copies of the documents contained within its own case file for his prior appeal in the underlying case.

filed an Evaluation Pursuant to Idaho Code Section 18-211. (No. 46536 Conf. Exs., pp.12-21.) Dr. Hanger's evaluation concluded that, as a direct result of his serious mental illness, Mr. Foster did not possess an adequate understanding of the proceedings against him, and he did not possess an adequate ability to assist his counsel in his defense. (No. 46536 Conf. Exs., pp.20-21.) The evaluation also concluded that Mr. Foster's heightened distractibility, coupled with his delusional and disorganized cognitive abilities, significantly impaired his capacity to make intelligent decisions regarding a plea agreement. (No. 46536 Conf. Exs., p.21.)

Dr. Hanger's evaluation reported that Mr. Foster stated he was aware the individuals involved in the charged offenses had been at his home in relation to an outstanding warrant involving his battery against his mother. (*See* No. 46536 Conf. Exs., p.16.) However, Mr. Foster also stated that he did not think the individuals were officers, and that he thought they were thugs wearing jeans. (*See* No. 46536 Conf. Exs., p.16.) He stated that he became fearful because his neighbors had persecuted him in the past, he was afraid the individuals were going to take him into the woods and kill him, and the individuals involved said at one point, "Kill the Mexican." (*See* No. 46536 Conf. Exs, p.16.) Mr. Foster has Hispanic heritage. (No. 46536 Conf. Exs., p.13.) He further stated that, several months before, Senator Bernie Sanders told him over the phone that they were not cops and he needed to fight for his life. (*See* No. 46536 Conf. Exs., p.16.) Mr. Foster thought the individuals were there to harm him and his family. (*See* No. 46536 Conf. Exs., p.16.)

In March 2017, Dr. Hanger examined Mr. Foster after the magistrate court ordered a follow-up examination. (No. 46536 R., pp.80-81; No. 46536 Conf. Exs., pp.22-31.) Dr. Hanger's Re-Evaluation Pursuant to Idaho Code Section 18-211 concluded that Mr. Foster did not possess an adequate understanding of the proceedings against him or an adequate ability

to assist his counsel in his defense, and he had a significantly impaired capacity to make intelligent decisions regarding a plea agreement. (*See* No. 46536 Conf. Exs., pp.30-31.) The magistrate court then had Mr. Foster committed, and suspended the criminal proceedings. (*See* No. 46536 R., pp.90-91, 98-99.)

In early June 2017, James R. Barry, Ph.D., after evaluating Mr. Foster at the secure medical facility in May 2017, filed an Evaluation of Competency to Stand Trial. (No. 46536 Conf. Docs., pp.65-66.) Dr. Barry's evaluation concluded that Mr. Foster was currently not competent to stand trial. (No. 46536 Conf. Docs., p.66.) Later in June 2017, Dr. Barry filed an addendum to the evaluation, which concluded that it was likely that Mr. Foster could be restored to competency in the near future. (No. 46536 Conf. Docs., p.68.) Dr. Barry subsequently evaluated Mr. Foster in July 2017, and filed an update to the evaluation concluding that Mr. Foster was competent to stand trial. (No. 46536 Conf. Docs., p.70.)

The criminal proceedings against Mr. Foster resumed; in August 2017, after a preliminary hearing, the magistrate court bound him over to the district court. (*See* No. 46536 R., pp.140-48, 150.) The State then filed an Information charging Mr. Foster with two counts of attempted murder, with infliction of great bodily injury and use of a deadly weapon sentencing enhancements. (No. 46536 R., pp.151-55.) He pleaded not guilty to the charges. (No. 46536 R., p.156.) Based on the parties' stipulation, the court later entered an order for mediation. (No. 46536 R., pp.166-70.)

Pursuant to a mediated plea agreement, Mr. Foster agreed to plead guilty to amended charges of two counts of attempted murder, with infliction of great bodily injury sentencing enhancements. (*See* No. 46536 R., pp.180-93.) The district court ordered a presentence report and a psychological evaluation for Mr. Foster. (No. 46536 R., p.195.) Dr. Hanger conducted the



psychological evaluation in March 2018. (No. 46536 Conf. Docs., pp.156-66.) This evaluation reported that Mr. Foster’s “behavioral presentation was considered markedly different from that displayed during this examiner’s previous evaluation of the defendant, approximately 1 year ago, as evidenced by his clarity in focus to topics, acknowledged awareness of his delusional beliefs, improved cognitive organization, and lucidity of his expressive communication.” (No. 46536 Conf. Docs., p.165.)

At the sentencing hearing, Mr. Foster’s sister, his mother, and Dr. Hanger testified. (*See* No. 46536 6/5/18 Tr., p.53, L.3 – p.103, L.25.) The State recommended that the district court impose the maximum sentence of fifteen years for each of the attempted murder counts, and an additional twenty years for the sentencing enhancement, to be served consecutively for a total of fifty years. (*See* No. 46536 6/5/18 Tr., p.105, L.24 – p.113, L.9.) Mr. Foster recommended that the court impose a unified sentence of thirty years, with ten years fixed. (*See* No. 46536 6/5/18 Tr., p.122, Ls.13-15.) The district court told Mr. Foster, “I’m balancing the fact that you obviously were acting under delusions.” (No. 46536 6/5/18 Tr., p.132, Ls.9-11.) For each count, the court imposed a unified sentence of twenty-five years, with twelve-and-a-half years fixed, to be served consecutively. (No. 46536 R., pp.243-46 (Amended Judgment of Conviction).) Mr. Foster appealed, and the Idaho Court of Appeals affirmed his conviction and sentences in *State v. Foster*, No. 46536 (Idaho Ct. App. Nov. 6, 2019). (*See* R., p.64.)

Mr. Foster subsequently filed, pro se, a Petition and Affidavit for Post-Conviction Relief. (R., pp.5-11.) As grounds for relief, he asserted, “[counsel’s] failure to bring mitigating evidence to sentence”; “ineffective assistance of counsel”; and “misdiagnosed mental condition to plead guilty.” (R., p.6.) On ineffective assistance of counsel, Mr. Foster asserted that his counsel

“failed to investigate and get a second opinion on mental health,” and “failed to admit mitigating evidence at sentencing [i.e.], mental health diagnosis and competency.” (R., p.7.)

In the Affidavit of Facts in Support of Post-Conviction Petition, Mr. Foster averred, “I was diagnosed with [psychosis] and had [delusions] and other mental health issues at the sentencing and did not fully understand my sentence or the consequences of the plea.” (R., p.10.) He asserted, “I have also been given medication in the BHU that helps me and allows me to see clearly.” (R., p.10.) Mr. Foster asserted, “Changed circumstances as of treatment requires a psychiatric examination prior to any plea negotiations.” (R., p.10 (citing federal appellate circuit cases).) The district court granted Mr. Foster’s motion for the appointment of post-conviction counsel. (R., pp. 12-15, 29.)

The State filed a Motion for Summary Disposition. (R., pp.44-45.) The State contended that Mr. Foster’s “claims fail to raise a genuine issue of material fact regarding both deficient performance of trial counsel and resulting prejudice.” (R., p.44.)

The State also filed a Brief in Support of Motion for Summary Disposition. (R., pp.46-50.) The State wrote that Mr. Foster “provided a full trial transcript of this matter in his Petition and Affidavit for Post Conviction Relief. At this time the State does not believe there are any other pleadings or materials contained within the Court file that are necessary for the Court to take judicial notice of.” (R., p.46.)

The State argued, “The Petitioner’s mental state was always at the center of this case.” (R., p.49.) The State described the mental health examinations conducted on Mr. Foster in the underlying case, and then contended, “A centerpiece of the defense’s presentation in Mr. Foster’s sentencing hearing surrounded his struggles with mental illness.” (*See* R., pp.49-50.) The State argued, “Without question, a cursory examination of the record in this case shows his trial

counsel recognized the biggest and perhaps only mitigating factor for sentencing in this case was Petitioner's mental health issues." (R., p.50.) The State concluded that "the conduct of trial counsel for Mr. Foster did not fall below the [*Strickland v. Washington*, 466 U.S. 668 (1984)] standards. Mr. Foster was provided a good defense." (R., p.50.)

Mr. Foster, through post-conviction counsel, filed an Issues, Synopsis and Timeline Re: Post Conviction. (R., pp.53-57.) He asserted that he intended to raise the issues of, "Ineffective assistance of counsel for failure to bring mitigating evidence," and, "Misdiagnosed mental condition when he plead guilty." (R., p.57.)

Mr. Foster also filed a Petitioner's Argument. (R., pp.58-60.) He asserted "essentially that prior counsel was ineffective by failing to present mitigating evidence at sentencing. The mitigating evidence would have been a second opinion on Defendant's mental health, which undoubtedly was a serious issue." (R., p.58.) "However, no such second opinion was ever obtained and thus could not have been proffered as evidence." (R., p.58.)

According to Mr. Foster, "The other issue raised was whether Defendant was mentally unfit at the time he entered his plea." (R., p.58.) He asserted that there was no absolute requirement that second opinions always be sought, whether to get one varied from case to case, and while it might become better policy to always request one, it was not legally required. (*See* R., pp.58-59.) Mr. Foster asserted, "It certainly would have been appropriate to get the second opinion. Unfortunately, one doesn't know what that opinion might have been. Would have it been the same or in conflict? Mitigating or not?" (R., p.59.)

Moreover, Mr. Foster asserted, "The other claim was mental illness at the time of entry of plea, which would invalidate the guilty plea. One can readily argue the Defendant had been mentally ill for years before and after the crimes." (R., p.59.) He asserted, "There was no

exculpatory evidence, nor any evidence which might mitigate the sentence available, so none was offered.” (R., p.59.)

The district court conducted a hearing on the motion for summary disposition via Zoom. (See R., pp.61-62.) The State repeated its argument that Mr. Foster’s “mental condition was simply the center piece of this entire case.” (See 10/19/20 Tr., p.7, Ls.13-15.) Mr. Foster’s post-conviction counsel told the court that Mr. Foster wanted him to offer additional medical records, but Mr. Foster had not been able to obtain those records. (See 10/19/20 Tr., p.10, Ls.7-14.)

The district court subsequently issued a Memorandum Decision & Order Granting State’s Motion for Summary Disposition. (R., pp.63-72.) The court noted, “Judicial notice is taken of the case file in Bonner County Case CR-2017-457, per Idaho Rule of Evidence 201. All citations to court documents in this Memorandum Decisions are of documents filed in Case CR-2017-457.” (R., p.63 & p.64 n.1.) In that note, the district court did not identify the specific documents or items so noticed. (See R., p.64 n.1.)

After discussing the record in the underlying case and citing particular documents from that record, the district court determined, “The record of the underlying criminal action, as set forth above, clearly disproves Mr. Foster’s claims of ineffective assistance of counsel.” (See R., pp.66-70.) The court determined that trial counsel “brought forth mitigating evidence of Mr. Foster’s mental condition from his mother and sister, as well as from Dr. [Hanger], at sentencing.” (R., p.70.) Per the district court, “In fact, Dr. [Hanger] testified in some detail about Mr. Foster’s mental health treatment, diagnosis, and competency during the course of the criminal proceedings.” (R., p.70.)

The district court also determined, “the record of the underlying criminal action set forth above is uncontroverted.” (R., p.70.) Based on that record, the court determined that the most

probable inference to be drawn “is that from the time of her appointment, [trial counsel] recognized Mr. Foster’s mental condition as a mitigating factor, because she moved the magistrate court to have him evaluated by Dr. [Hanger], and investigated and sought medical records related to his mental health and diagnosis.” (R., pp.70-71.) Thus, the district court found “that the record in the criminal action clearly disproves Mr. Foster’s claims of ineffective assistance of counsel.” (R., p.71.)

Further, the district court determined that Mr. Foster’s claim of misdiagnosed mental condition was unsupported by evidence. (R., p.71.) The court determined, “Mr. Foster’s claim that he had a misdiagnosed mental condition when he pled guilty is a mere conclusory allegation unsupported by any admissible evidence.” (R., p.71.) The district court wrote that, to the contrary, the record showed that client underwent numerous mental health evaluations, and the criminal matters against him were suspended until he received psychiatric treatment and was ultimately deemed competent to stand trial. (See R., p.71.) According to the court, “Mr. Foster has not presented any admissible evidence of any misdiagnosed mental condition at the time of his entry of plea.” (R., p.71.) Thus, the district court determined, “this claim fails for a total lack of evidence.” (R., p.71.)

The district court determined that “Mr. Foster’s claims are clearly disproven by the record of the criminal action or are unsupported by admissible evidence. Therefore, he is not entitled to the relief requested as a matter of law, and his petition for post-conviction relief shall be dismissed.” (R., p.71) The court granted the motion for summary disposition, and dismissed the petition for post-conviction relief. (R., p.72.) The district court also issued a judgment dismissing the petition. (R., p.73.) Mr. Foster filed a Notice of Appeal timely from the

Memorandum Decision & Order Granting State's Motion for Summary Disposition and the Judgment. (R., pp.74-76; *see* R., pp.91-95 (Amended Notice of Appeal).)

ISSUE

Did the district court abuse its discretion by taking judicial notice of the entire case file from Mr. Foster's underlying case, in contravention of the specificity requirement of Idaho Rule of Evidence 201(c)?

## ARGUMENT

### The District Court Abused Its Discretion By Taking Judicial Notice Of The Entire Case File From Mr. Foster's Underlying Case, In Contravention Of The Specificity Requirement Of Idaho Rule Of Evidence 201(c)

#### A. Introduction

Mr. Foster asserts that the district court abused its discretion by taking judicial notice of the entire case file from the underlying case. In the Memorandum Decision and Order Granting State's Motion for Summary Disposition, the district court in a sua sponte decision noted, "Judicial notice is taken of the case file in Bonner County Case CR-2017-457, per Idaho Rule of Evidence 201. All citations to court documents in this Memorandum Decision are of documents filed in Case CR-2017-457." (R., p.64 n.1.) However, Idaho Rule of Evidence 201 provides, "When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed." I.R.E. 201(c). Because the district court did not comply with the specificity requirement of Rule 201(c) when it took judicial notice of the entire case file from the underlying case, it did not act consistently with the applicable legal standards. Thus, the district court abused its discretion. The district court's abuse of discretion was not harmless, because the improperly noticed facts influenced the outcome of this case.

#### B. Standard Of Review And Applicable Law

"A post-conviction relief petition initiates a civil, rather than criminal, proceeding." *State v. Yakovac*, 145 Idaho 437, 443 (2008). "Like the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based." *Id.* (citing I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869



(1990)). An application for post-conviction relief differs from a complaint in an ordinary civil action, in that the application must contain much more than a short and plain statement of the claim that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). *Id.* at 443-44. Rather, “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Id.* at 444 (citing I.C. § 19-4903).

“Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the trial court’s own initiative.” *Id.* “Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56.” *Id.* “Summary dismissal is permissible only when the applicant’s evidence has raised no genuine issue of material fact that, if resolved in the applicant’s favor, would entitle the applicant to the relief requested.” *Id.* “A material fact has ‘some logical connection with the consequential facts,’ *Black’s Law Dictionary*, 991 (7<sup>th</sup> Ed. 1999), and therefore is determined by its relationship to the legal theories presented by the parties.” *Yakovac*, 145 Idaho at 444. “If such a factual issue is presented, an evidentiary hearing must be conducted.” *Id.* “However, summary dismissal may be appropriate even where the State does not controvert the applicant’s evidence because the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Id.*

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing,” an appellate court “must determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” *Id.* “Where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.” *Id.* (internal

quotation marks omitted). “When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.” *Id.* (internal quotation marks omitted).

However, “Disputed facts should be construed in favor of the non-moving party . . . .” *Vavold v. State*, 148 Idaho 44, 45 (2009). The appellate court “has free review of questions of law.” *Rhoades v. State*, 148 Idaho 247, 250 (2009).

Idaho Rule of Evidence 201 authorizes the judicial notice of adjudicative facts. I.R.E. 201(a). A court may take judicial notice of facts that are not subject to reasonable dispute, because they are “generally known within the trial court’s territorial jurisdiction,” or, they “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” I.R.E. 201(b). A court “may take judicial notice on its own.” I.R.E. 201(c)(1). “When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed.” I.R.E. 201(c).

An appellate court reviews a district court’s judicial notice decision for an abuse of discretion. *See Rome v. State*, 164 Idaho 407, 413 (2018) (addressing the review of district court rulings under former Rule 201(d)). When reviewing a district court decision for an alleged abuse of discretion, the appellate court considers whether the district court: “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with relevant legal standards; and (4) reached its decision by an exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018).

C. The District Court Did Not Act Consistently With The Applicable Legal Standards When It Took Judicial Notice Of The Entire Case File From The Underlying Case

The district court did not act consistently with the applicable legal standards when it took judicial notice of the entire case file from the underlying case, because it did not comply with the specificity requirement of Rule 201(c). Thus, the district court abused its discretion.

1. This Issue Is Preserved For Appellate Review

As a preliminary matter, the issue of whether the district court abused its discretion by sua sponte taking judicial notice of the entire case file from the underlying case is preserved for appellate review, even though Mr. Foster did not expressly object to the district court's judicial notice. Rule 201 provides, "On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." I.R.E. 201(e).

The Idaho Court of Appeals has recently held, "Under the plain language of Rule 201(e), a party challenging the propriety of a court's judicial notice and the nature of the facts the court noticed is required to request to be heard on the matter." *Chaput v. State*, No. 47459, 2021 WL 900165, at \*3 (Idaho Ct. App. Mar. 10, 2021), *petition for review denied* (Idaho June 7, 2021). According to the Court of Appeals in *Chaput*, "Such a request gives the court the opportunity to decide the party's challenge. This decision in turn forms the basis for an appellate review." *Id.* The Court of Appeals held, "Absent a request to be heard on a challenge, the party fails to preserve the issue for appeal." *Id.* Thus, the Court of Appeals held that, because the petitioner in

*Chaput* “never challenged the district court’s judicial notice, he failed to preserve the issue for appeal.” *Id.*<sup>2</sup>

The Court of Appeals’ decision in *Chaput* is contrary to decisions of the Idaho Supreme Court on issue preservation. The general rule is that “both the issue and the party’s position on the issue must be raised before the trial court for it to be properly preserved for appeal.” *State v. Gonzalez*, 165 Idaho 95, 99 (2019). However, the Court has applied an exception to the general rule “when the issue was argued to or decided by the trial court.” *State v. DuValt*, 131 Idaho 550, 553 (1998). The Court “recognizes a distinction between issues not formally raised below and issues that never ‘surfaced’ below.” *State v. Jeske*, 164 Idaho 862, 868 (2019) (quoting *Kolar v. Cassia Cnty., Idaho*, 142 Idaho 346, 354 (2005)).

For example, in *Jeske*, the defendant filed a motion to have his refusal to engage in field sobriety tests and a breathalyzer test redacted. *See id.* at 867. In denying the motion, the district court determined that the refusals to engage in those tests were admissible, and sua sponte determined that the defendant’s refusal to submit to a blood draw was also admissible. *See id.* On appeal, the *Jeske* Court held that, “even though Jeske’s counsel did not explicitly mention the blood draw at one point in time, the judge specifically identified the blood draw in her ruling.” *Id.* at 868. The Court held, “Consequently, the issue regarding Jeske’s refusal to submit to the blood draw was ruled on, preserved, and will be addressed in this appeal.” *Id.*

Additionally, in a civil case where the magistrate court issued its order deciding the case, the magistrate court “sua sponte ruled ‘that the parties shall bear their own attorney’s fees and

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<sup>2</sup> As seen above, the Idaho Supreme Court denied the petition for review in *Chaput* on June 7, 2021. However, there is a similar question of judicial notice and issue preservation before the Court in *State v. Neimeyer*, No. 46857, 2020 WL 2534003 (Idaho Ct. App. May 19, 2020), *petition for review granted* (Idaho Jan. 21, 2021) (No. 48572).

costs.” See *In re Guardianship of Doe*, 157 Idaho 750, 757-58 (2014). On appeal to the district court, one party argued the magistrate court erred by summarily denying attorney fees, but the district court determined that the issue was improperly raised for the first time on appeal because the party did not seek attorney fees before the magistrate, file any objection to the denial, or file a motion to reconsider it. *Id.* at 758. On review, the Idaho Supreme Court held that the district court erred in not vacating the magistrate’s sua sponte ruling. *Id.* The Court held, “Prior to the issuance of the court’s order, neither party could have known what the court’s ruling would be and would have no basis for claiming to be the prevailing party.” *Id.* The Court also held, “Once the court ruled, [the party] did not have to file a memorandum of costs or object in order to preserve the issue for appeal.” *Id.* Further, the party “did not have to file a motion for reconsideration in order to preserve the issue on appeal.” *Id.*

In a later case, the Court explained that the party from *Guardianship of Doe* essentially “had not waived consideration of the attorney fees issue because the magistrate court had not properly acted on the issue and presented them with a meaningful opportunity to object.” *In re Estate of Birch*, 164 Idaho 631, 634 (2019). The magistrate court in the *Estate of Birch* case awarded attorney fees in its closing order. See *id.* at 632. The party ordered to pay attorney fees appealed, and the district court determined that the party “had waived any challenge to the . . . award of attorney fees by failing to object” to the other’s party’s “memorandum of costs and fees within fourteen days as required by Idaho Rule of Civil Procedure 54(d)(5).” *Id.* at 633. On appeal to the Idaho Supreme Court, the Court held, “this case mirrors a situation already considered by this Court in [*Guardianship of Doe*].” *Id.* at 634. The Court wrote that it had held in other cases that a trial court could not award attorney fees without providing the non-moving

party with an opportunity to raise relevant facts and legal principles in its defense. *Id.* Thus, the Court held, “By affirming on this basis, the district court erred.” *Id.*

Conversely, the Idaho Supreme Court in *State v. Barr*, 166 Idaho 783 (2020), held that the exception did not apply where a district court had not issued a ruling on the issue raised on appeal. *See Barr*, 166 Idaho at 787. In *Barr*, the district court imposed a sentence on the defendant after reasoning that the mandatory minimum provision of Idaho Code § 19-2520G left it no discretion to impose a less severe sentence. *See id.* at 784. The district court had made comments that it believed it lacked discretion before and during sentencing. *See id.* at 785-86. On appeal, the defendant raised the argument that section 19-2520G was unconstitutional. *Id.* at 784.

The Court in *Barr* wrote that the defendant “did not argue that section 19-2520G is unconstitutional before the district court.” *Id.* at 787. The *Barr* Court also recognized, “on occasion we have allowed an issue that was not formally raised below to be considered on appeal when the issue was implicitly before the lower tribunal, and was considered and passed on by that tribunal.” *Id.* (quoting *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 357 (1990)) (alternation and internal quotation marks omitted) (citing *State v. DuValt*, 131 Idaho 550, 553 (1998)). The defendant in *Barr* argued that the constitutional issue was properly before the Court, because the district court made statements about mandatory minimum sentencing laws at the sentencing hearing. *See id.* The *Barr* Court held, “While the district court expressed his personal opinions and frustrations with mandatory minimum sentencing laws, the issue was not before the district court; it never heard arguments from the parties or issued a *ruling* on whether section 19-2520G was unconstitutional.” *Id.* The Court held, “Even if these comments constituted a ruling, *Barr*

did not raise the issue or take the position that section 19-2520G was unconstitutional. Therefore, the exception does not apply.” *Id.*

Here, the district court actually decided the question of judicial notice. The district court noted, “Judicial notice is taken of the case file in Bonner County Case CR-2017-457, per Idaho Rule of Evidence 201.” (R., p.64 n.1.) However, the parties had not requested that the district court take judicial notice in such a wide-sweeping fashion. (*See, e.g., R., p.46.*) Thus, the district court made a sua sponte decision to take judicial notice of the entire case file from the underlying case. Unlike the situation in *Barr*, the district court did not indicate it had reached its judicial notice decision before making it, and so Mr. Foster did not have an opportunity to raise issues related to that decision. *See Barr*, 166 Idaho at 785-86. Accordingly, the issue of whether the district court abused its discretion by taking judicial notice is preserved under the exception identified by the Court in *Jeske* and *DuValt*. *See, e.g., Jeske*, 164 Idaho at 868; *DuValt*, 131 Idaho at 553. The Court of Appeals’ decision in *Chaput* is contrary to those cases and other precedent where the Court found the exception.

Moreover, the plain language of Rule 201(e) does not actually require a defendant to request a district court to reconsider a judicial notice decision, to preserve that issue for appeal. The interpretation of a court rule “must always begin with the plain, ordinary meaning of the rule’s language,” but “it may be tempered by the rule’s purpose.” *State v. Montgomery*, 163 Idaho 40, 44 (2017). Rule 201(e) provides, “On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.” I.R.E. 201(e). Nowhere in Rule 201(e) does the rule require a party to object to a court’s sua sponte judicial notice decision, to preserve the issue for appeal. In fact, the mandatory language

pertains to the court, which must give a party an opportunity to be heard if the party so requests after the court takes judicial notice. *See id.*

Thus, Mr. Foster's assertion that the district court abused its discretion by taking judicial notice of the entire case file from the underlying case is preserved for appeal, through the district court's decision to so take judicial notice. This Court may therefore review the question of whether the district court acted consistently with the applicable legal standards when it took judicial notice.

2. The District Court Did Not Comply With The Specificity Requirement Of Rule 201(c)

The district court did not act consistently with the applicable legal standards when it took judicial notice of the entire case file from the underlying case, because it did not comply with the specificity requirement of Rule 201(c).

As discussed above, "When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed." I.R.E. 201(c). The Idaho Supreme Court has held that a district court erred by taking judicial notice of an entire case file, because it failed to comply with the specificity requirement of Rule 201. *Taylor v. McNichols*, 149 Idaho 826, 835-36 (2010).

Here, like the district court in *Taylor v. McNichols*, the district court here took judicial notice of the entire case file, without complying with the specificity requirement of Rule 201. (*See R.*, p.64 n.1.) By taking judicial notice "of the case file in Bonner County Case CR-2017-457," the district court did not "identify the specific documents or items so noticed." *See* I.R.E. 201(c). The district court therefore did not act consistently with the applicable legal standards. Thus, the district court abused its discretion. *See Lunneborg*, 163 Idaho at 863.



D. The District Court's Abuse Of Discretion Was Not Harmless

The district court's abuse of discretion by taking judicial notice of the entire case file from the underlying case was not harmless. A court must disregard all errors and defects that do not affect any party's substantial rights. I.R.C.P. 61.

The district court's abuse of discretion here affected Mr. Foster's substantial rights, because it influenced the outcome of the case. The district court, after improperly taking judicial notice of the entire case file in the underlying case, determined that Mr. Foster's ineffective assistance of counsel claims "are clearly disproven by the record." (*See R.*, p.70.) The district court determined, "The record of the underlying criminal action, as set forth above, clearly disproves Mr. Foster's claims of ineffective assistance of counsel." (*R.*, p.70.)

Per the district court, "First, the record clearly shows that trial counsel . . . brought forth mitigating evidence of Mr. Foster's mental condition from his mother and sister, as well as from Dr. [Hanger], at sentencing." (*R.*, p.70.) The district court also determined, "Second, the record of the underlying criminal action set forth above is uncontroverted." (*R.*, p.70.) Based on the record, the district court determined, "the most probable inference to be drawn is that from the time of her appointment, [trial counsel] recognized Mr. Foster's mental condition as a mitigating factor, because she moved the magistrate court to have him evaluated by Dr. [Hanger], and investigated and sought medical records related to his mental health and diagnosis." (*R.*, pp.70-71.)

Additionally, the district court determined, "Mr. Foster's claim that he had a misdiagnosed mental condition when he pled guilty is a mere conclusory allegation unsupported by any admissible evidence." (*R.*, p.71.) According to the district court, "On the contrary, the record shows that Mr. Foster underwent numerous mental health evaluations by Dr. [Hanger],

Dr. Barry, and Kootenai Health during the course of the criminal proceedings.” (R., p.71.) Further, “the criminal matters against him were suspended until he had received psychiatric treatment and was ultimately deemed competent to stand trial by a licensed medical professional.” (R., p.71.)

As seen above, the district court referenced the record from the underlying case when it determined that Mr. Foster’s issues did not survive summary dismissal. Because the improperly noticed facts influenced the outcome of the case, the district court’s abuse of discretion was not harmless.

The district court’s later citations to particular documents in the case file from the underlying case did not cure the error. (See R., pp.66-71.) The Idaho Supreme Court rejected such an approach in *Taylor v. McNichols*. In that case, the plaintiff had an underlying case where he filed suit against business entities, and while that suit was pending, he filed another suit against his attorneys in the underlying case. See *Taylor v. McNichols*. 149 Idaho at 830-31. In that second case, the district court found that the arguments made by the parties “incorporated events and actions that occurred in the Underlying Case and, therefore, took judicial notice of the Underlying Case in toto.” *Id.* at 831. On appeal, the Court held that the district court erred in taking judicial notice of the underlying case without complying with Rule 201’s specificity requirement. *Id.* at 835-36. The Court reached that conclusion even though it presumably would have been possible, from the parties’ arguments, to ascertain which “events and actions” from the underlying case the district court was referencing. See *id.* at 835-36.

Moreover, holding that the later citations cured the error would render the specificity requirement of Rule 201(c) a nullity. If the district court could properly take notice of an entire case file and only later identify specific relevant adjudicative facts, there would be no reason to

first require the court to specifically identify those facts. Under Rule 201, judicial notice may be taken only of adjudicative facts, which are controlling or operative facts, rather than background facts. *See Rome*, 164 Idaho at 414. Judicial notice is only appropriate when the specific documents or items to be noticed are identified. *See id.* at 415. In interpreting the previous version of Rule 201, the *Rome* Court explained that specificity is required for parties' requests for judicial notice, because, "A request for judicial notice should aid the court in construing and applying the rules of evidence 'to the end that the trial may be ascertained and proceedings justly determined[,]', I.R.E. 102 (1985) (amended 2018)." *Rome*, 164 Idaho at 416. A party's request for judicial notice should "not saddle the court with an inefficient and onerous obligation to scour the records of underlying or separate cases in an aimless search for information that might be potentially relevant." *Id.*

The same logic applies to judicial notice taken sua sponte by a district court; requiring the court to specify the documents or items noticed likewise helps ensure judicial efficiency. *See id.* Further, this Court generally avoids interpretations of court rules that would render a part of the rule a nullity. *See State v. Jones*, 154 Idaho 412, 422 (2013) ("Generally speaking, 'it is incumbent upon a court to give a statute an interpretation which will not render it a nullity.'") (quoting *Hecla Mining Co. v. Idaho State Tax. Comm'n*, 108 Idaho 147, 151 (1985)); *Miller v. Haller*, 129 Idaho 345, 350 (1996) (applying the same standards of construction to a court rule as are used with statutes).

The district court's abuse of discretion here affected Mr. Foster's substantial rights, because the improperly noticed facts influenced the outcome of the case. Thus, the district court's abuse of discretion by taking judicial notice of the entire case file from the underlying case was not harmless. The judgment dismissing Mr. Foster's post-conviction petition, and the

district court's memorandum decision and order granting the State's motion for summary disposition, should be vacated, and the matter should be remanded to the district court for further proceedings.

#### CONCLUSION

For the above reasons, Mr. Foster respectfully requests that this Court vacate the judgment dismissing his post-conviction petition, and the district court's memorandum decision and order granting the State's motion for summary disposition, and remand the matter to the district court for further proceedings.

DATED this 15<sup>th</sup> day of June, 2021.

/s/ Ben P. McGreevy  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of June, 2021, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
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/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

BPM/eas